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SUPREME COURT, U. S.

No. 73-598

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

MICHAEL J. MARCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was improperly denied the right to cross-examine a co-defendant, that the evidence was insufficient to sustain his conviction, and that he was improperly denied a severance.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner and co-defendant Nardella were convicted of selling a machine gun without the prior approval of the Secretary of the Treasury, in violation of 26 U.S.C. 5812(a) and 5861(e). Petitioner was sentenced to imprisonment for six months and to thirty months' probation. The court of appeals affirmed (Pet. App.).

The evidence showed that in July 1971 defendant Nardella, without prior Treasury Department authorization, sold a machine gun to Treasury undercover agent Sack (Pet. App. 2-3). Some three weeks thereafter,

Treasury agent Vita and an informer sought to make a purchase of a machine gun from petitioner. After checking Vita's identification and discussing price, petitioner asked Vita if he had seen the gun which Sack had bought, saying that he, petitioner, had given it to a friend to sell for a commission of fifty dollars (Pet. App. 7-8). Evidence was also admitted that petitioner had sold another machine gun without authority to a third Treasury agent within a few weeks of the charged offense (Pet. App. 10).

All of petitioner's contentions were properly rejected in the thorough opinion of the court below, on which we principally rely. We add only the following:

1. Petitioner insisted on resting his case before the presentation of Nardella's defense, despite the warnings of the court that in so doing he would be waiving the right to cross-examine any witnesses Nardella might present, including Nardella himself (Pet. App. 9). Petitioner fully recognized, even before the trial, the likelihood that Nardella would claim entrapment (Pet. 8). His inability to cross-examine Nardella was thus the result of a considered strategy, foreclosing his present complaint. *United States* v. *Holmes,* 452 F. 2d 249, 269 (C.A. 7), certiorari denied, 405 U.S. 1016.

2. The conversation in which petitioner admitted to agent Vita that, through Nardella, he had sold the machine gun which was the subject of the charge against him, showed that petitioner and Nardella were joined in a criminal venture and rendered admissible against petitioner the independent evidence initially admitted only as to Nardella. Thus, the conviction is not based solely on petitioner's own admissions, as petitioner claims, but on the evidence introduced against Nardella as well. Moreover, the similar transaction at

about the same time with a third agent constituted substantial corroboration of petitioner's admissions. See *Opper* v. *United States,* 348 U.S. 84, 93-94.

3. After petitioner had rested, Nardella took the stand and testified that he had obtained from petitioner the machine gun which was the subject of this charge (Pet. App. 8; Pet. 5). The court instructed the jury to consider this statement solely as to defendant Nardella (Pet. App. 5-6). Petitioner urges that a jury would find it impossible to follow this instruction. However, it is not at all clear that petitioner was entitled to this instruction (see *United States* v. *Kahn,* 366 F. 2d 259, 263 (C.A. 2), certiorari denied, 385 U.S. 948), and such evidence, which in any event was merely corroborative of petitioner's admission, would have likely been available to the government in a separate trial—and with no instruction that it should be disregarded. Consequently, the trial judge, as the court below found, did not abuse his discretion in disallowing petitioner's motion for a severance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.